Officer not under the said section 8(1) but under section 7 of the said Ordinance. As the error in law made by the District Officer was to the disadvantage of those 4 persons who should have got complete instead of mere possessory titles I consider it inequitable to declare the said order null and void."

With respect we agree with the plaintiff's argument before us that the learned trial judge should have declared this GSO also null and void, because the enquiry officer purported to make it under section 8(1) and there is no reference whatsoever in the notes of evidence taken by him that the persons in whose favour the order was made were in possession and that on the contrary the phrase "Warith agree to possession by . . . etc." suggests that the order was made by consent of the alleged warith.

If the enquiry officer had no jurisdiction to make the order under section 8(1), equally he has no jurisdiction to make it under section 7 either, because under the latter section also it is necessary that the person whose interest is to be registered by virtue of the order should be in possession.

By the time of the trial the quarter share in Lot 579 which had been given to Che Teh bin Che Lah by the enquiry officer had been sold by him for $656.20 to a *bona fide* purchaser, Che Selamat binti Che Teh. Accordingly we would order that as regards this quarter share the third defendant do pay the plaintiff $656.20 damages, and that the other ¾ share be registered in the name of the plaintiff.

Third Ground of Appeal

The third ground of appeal relates to Lot 606 of which the deceased owned a half share. The learned judge found that by the time of the trial the whole of this half share had been transferred by Nik Mek, the first defendant. In evidence the first defendant said that she sold it in 1966 for $2,500. Now a licensed appraiser (PW4) said in evidence that at the request of the plaintiff's solicitors he on 9th July, 1970, valued this half share at $9,837.75. However the learned judge accepted the sale price of $2,500 as the basis for awarding damages and accordingly ordered the first defendant to pay the plaintiff that amount. Before us it is argued on behalf of the plaintiff that the trial judge was wrong and should have awarded the plaintiff $9,837.75 damages in respect of this lot.

With respect we do not think there is any merit in this ground, as damages are to be measured by reference to the position of the plaintiff at the date when the damage or loss was suffered and this is normally the date of the commission of the wrong complained of.

In the result this appeal is allowed to the extent set out above, and with costs. Deposit to be returned to appellant.

Order accordingly.

Solicitors: *Wilson & Co.*

MAHIMA SINGH & ORS. v. BULDEV SINGH

[F.C. (Ali, Ong Hock Sim and Raja Azlan Shah F.JJ.) January 4, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 80 of 1974]

Companies — Private company — Issue of shares — Whether issue of shares contrary to articles.

The Seremban Town Service Sendirian Bhd. had resolved at its annual general meeting to allot shares to bumiputras. The directors of the company subsequently decided to issue shares to Malay employees. No offer or notice was given to the respondent and other shareholders in accordance with article 46 of the Articles of Association of the company. The respondent applied for a declaration that the acts of the appellants, the directors of the company, in issuing the shares was *ultra vires* the Articles of Association of the company. The learned trial judge allowed the application, as he held that the act of the appellants in alloting the shares was contrary to the resolution passed at the Annual General Meeting (see [1974] 2 M.L.J. 206). The appellants appealed.

Held, dismissing the appeal: the acts of the appellants were *ultra vires* the articles of association as the appellants had failed to offer the shares or give notice to the respondent and other shareholders as required by the articles of association of the company.

Cases referred to:-

(1) *Park* v. *Royalties Syndicate Limited* [1912] 1 K.B. 330 at p. 342.

(2) *Rattan Singh and others* v. *Managing Director of Moga Transport Company* A.I.R. 1959 Punjab 196.

FEDERAL COURT.

A. K. J. D'Cruz for the appellants.

Dulip Singh for the respondent.

Ong Hock Sim F.J.: The appellants are three of four directors of the Seremban Town Service Sendirian Berhad (hereinafter called "the company") and were sued in their capacities as such, as the second, third and fourth defendants by the respondent, a shareholder of the company, in Civil Action No. 449 of 1973, in the High Court at Kuala Lumpur. Action was discontinued at the commencement of the hearing against the first defendant, the company's managing director and father of the respondent.

The proceedings were instituted as a result of a decision of the Board of Directors at a meeting on April 7, 1973 to allot to nine named Bumiputra workers of the company 31,500 unissued shares at par which would thereby increase the paid-up capital to $136,500 of the authorised capital of $250,000. The basis of the action is set out in paragraphs 6 and 7 of the Statement of Claim as follows:

"6. The defendants have recently resolved to grant and/or issue the un-issued new shares of the said company to members of the public which said shares have not or at all been first offered to the plaintiff and the existing share-holders of the company in accordance with the aforesaid Articles of Association of the said company."

(These Articles were Articles 6 to 9, 25 to 40 and 46 — *vide* paragraph 5 of the Statement of Claim.)

"7. The defendants' resolution to grant and/or issue such unissued new shares to members of the public are void and unlawful and *ultra vires* the Articles of Association of the said company as the said Articles expressly prohibit such issues to any members of the public."

The Statement of Defence appears unnecessarily verbose and patently evasive and briefly the appellants say:

(a) Neither the appellant nor any other shareholder was entitled to be offered the shares in question.

(b) The offer of such shares was in accordance with the Articles of Association and in compliance with the New Economic Policy to enable Bumiputras to own thirty *per centum* capital shares in commercial undertakings.

In opening his case, respondent's counsel posed the issues as hereunder:

1) Whether the plaintiff had under the articles the sole and primary rights to the issue of any or (of?) unissued shares of the company before offering the same to any one outside the company.

2) Whether the defendants by not offering these shares to the plaintiff are acting *ultra vires*.

3) If the defendants had acted so, whether such act is *bona fide* or *mala fide*.

4) Whether the defendants by virtue of the Articles of Association can act contrary to the decision of the company.

He conceded the answers to issues 3) and 4) were dependent upon the evidence but in our view, it was little wonder to us that the learned judge concluded "most of the lengthy evidence adduced was in fact unnecessary" and that —

"the hearing was protracted because plaintiff sought also to show that —

(a) the second defendant has throughout his tenure of office as director of the company never really been interested in the welfare of the company but only his own;

(b) there was evidence of bad faith in the decision of the Board of Directors; and

(c) the persons described in the list submitted by the second defendant to the Board of Directors were low level employees of the company and therefore men of straw and as such, not in a position to pay for the shares and consequently the venture of the company to allow bumiputra participation in this case was just another 'Ali Baba' system."

We agree with the learned judge's approach in the first instance as he says:

"Briefly, in the main action, the plaintiff seeks for a declaration that the acts of the defendants to issue the unissued new shares of the company to the selected persons is void and *ultra vires* of the Memorandum and Articles of Association of the company. The plaintiff also seeks for an injunction to restrain the defendants from holding or conducting any Directors' meeting to approve, issue, convey, dispose or transfer the unissued new shares of the company to any members of the public and to offer such shares first to the plaintiff and other existing shareholders of the company and upon default of acceptance to be offered to the Negri Sembilan State Development Corporation."

Where, however, with respect, he erred was when he said:

"In order to succeed, all that the plaintiff need show is that the *decision* of the Board of Directors at the meeting of 7th April, 1973 and their acts in subsequent meetings to allot 31,500 unissued shares to the Malay employees of the company *was in contravention of the resolution of the Annual General Meeting* of the company *held on the 29th November, 1972*, having regard to the provisions of Articles 1, 6, 40 and 46 of the Articles of Association of the company."

In our view, that is not quite correct as the question is one of contravention of the Articles rather than of the November resolution. We think, however, "decision" is the correct word to use with reference to the acceptance of the proposal by the second appellant (duly carried) for allotment of the shares to the nine Bumiputra workers, though it appears in paragraph 7 of the Statement of Claim and in paragraph 5 of the Statement of the defence and in the Minutes, when the proposal was "put to vote, Encik Jangir Singh's *resolution* is carried by 3 to 1". He then referred to the Resolution of November 29, 1972, which he construed as "authorising the Company to accept Malay participation but restricted to 30% of the issued and paid-up capital at the time of entry of Malay shareholders *and that these Malay shareholders shall be those as may be approved by the N.S. Passenger Transport Operators' Association*" and went on to decide the case in favour of the Respondent in that "*the acts* of the Directors on the proposed allotment of the 31,500 shares of the company reflected in the Minutes of Directors' meeting on 7th April, 1973, and in the subsequent meetings *were against the resolution* of the Annual General Meeting of 29th November, 1972, *as the persons to whom it was proposed to allot shares were not persons approved by the N.S. Passenger Transport Operators' Association* ... and in contravention of Article 46 and ... therefore *ultra vires*."

With respect, we do not read the Resolution of November 29, 1972 as requiring prior approval of the Malay shareholders by the N.S. Passenger Transport Operators' Association as a condition precedent to allotment by the company. That resolution reads:

"It is unanimously *resolved* that the resolution by the General Meeting dated 7th April, 1971 as set out in paragraph IX of the minutes of the said meeting be and is hereby rescinded and *that* the *Malay participation* in the shareholding of the company *be restricted to 30% of the issued and paid-up capital* of the company *at the time of entry* of Malay shareholdings *as approved by the Negri Sembilan Transport Operators Association.*"

Our view that the words "as approved by the Negri Sembilan Transport Operators Association" referred to the extent of Malay participation rather than the personalities of the shareholders to whom the shares would be offered is confirmed by reference to a letter of October 11, 1972 signed by the President, Pan Malayan Road Transport Operators' Association to the Hon'ble the Minister for Communications, excerpts from which at pages 159 and 160 of the record we now reproduce:

"3. The N.S. Passenger Transport Operators' Association started negotiations with Y.B. Datuk Menteri Besar, Negri Sembilan on 20th August, 1971 offering the issue of 25% of the issued share capital of all their members to the State Development Corporation and this offer had been accepted."

"Since then, having been informed of the offer made by the Perak Omnibus Operators' Association, N.S. Operators had increased their offer from 25% to 30%."

We would differ therefore with the *ratio decidendi* of the learned judge, as at one point he correctly stated "the issue can therefore be resolved by answering: 'Were the acts ... as reflected in the Minutes of the meeting ... held on 7th April, 1973 ... on the face of those Articles permissible'." The Statement of Claim made no reference to the Resolution of November 29,

1972. The Respondent in evidence approved in principle the New Economic Policy encouraging Malay participation. He merely opposed the decision as being contrary to the Articles. As was said by Hamilton J. in *Park* v. *Royalties Syndicate, Limited*[1] with regard to the definition of "private company" in section 121 of the Companies (Consolidation) Act, 1908:

"Section 121 does not deal with a company which in fact restricts the right to transfer its shares, which in fact consists of only fifty members, and which in fact refrains from any invitation to the public, but with a company which restricts rights and prohibits invitations and limits the number of its members 'by its articles' by which alone it could restrict the right to transfer shares or prohibit an invitation to the public to subscribe for shares and debentures."

Several Articles were mentioned in paragraph 5 of the Statement of Claim. We reproduce only those which we believe relevant.

"1. The company is registered as a private company and accordingly:-

(a) the right to transfer shares is restricted in manner hereinafter provided.

(b) the number of the members of the company (exclusive of persons in the employment of the company and of persons who, having been formerly in the employment of the company, were, while in such employment, and have continued after the determination of such employment to be members of the company) shall be limited to fifty, provided that, for the purpose of this provision where two or more persons hold one or more shares in the company jointly, they shall be treated as a single member.

(c) any invitation to the public to subscribe for any shares or debentures or debenture stock of the company is prohibited."

"46. Unless otherwise determined by the Directors or by the resolution authorising an increase of capital any original shares for the time being unissued and any new shares from time to time to be created, shall before they are issued, be offered to the members in proportion as nearly as may be to the number of shares held by them. Such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time within which the offer if not accepted will be deemed to be declined, and after the expiration of such time or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered the Directors may, subject to the provisions of these presents dispose of the same in any manner which they think beneficial to the company. The Directors may in like manner dispose of any such new or original shares as aforesaid which, by reason of the ratio borne by them to the number of persons entitled to such offer as aforesaid or by reason of any other difficulty in apportioning the same, cannot in the opinion of the Directors be conveniently offered in manner hereinbefore provided."

Paragraph 5 of the Statement of Claim challenges the issue of the shares to "members of the public" without first offering the same to the shareholders. The first defendant stated in his letter of May 14, 1973 that it was "resolved to issue 31,500 shares at par to members of the public"! Blowing hot and cold, the Appellants said "there was no issue of shares to the public" but respondent knew the persons to whom the shares in question were to be allotted and that it was in accord with the New Economic Policy. In the same vein, they said the decision was in accordance also with the Articles of Association but neither the court nor any one was referred to the specific Article or Articles. They further claimed the Respondent had no right to be offered the shares. In dealing with these, the judge said:

"First, were the acts of the Directors in contravention of Article 1(c) in that the transaction constituted an invitation to the public to subscribe for the shares of the company which is prohibited under that Article? In my view it was not, on the authority of *Rattan Singh and others, Petitioners* v. *Managing Director of the Moga Transport Company*[2] as the persons to whom it was decided to allot the shares of 31.500 are selected persons they cannot be said to be the 'public' within the meaning of that Article. The transaction in question does not in my view amount to an offer which was open to anyone to bring his money and apply for the shares."

Regretfully, we think the judge was misled by the assurance of counsel that the case was on all fours with the instant case, as he also contended before us. We need only quote portions of the Order made therein to satisfy ourselves on the point: —

"The petitioners complain that the resolution reproduced above was never communicated to all the share-holders and those share-holders who did not belong to the group of respondent No. 1 were kept in the dark. It was stated that the memorandum and articles of association of this company do not authorise the issue of shares to strangers and the additional capital could be distributed among the existing share-holders only."

"Notice was given after the order of this court dated 8th of August, 1958, by the company to all the share-holders of the company from whom there had been no response to the previous offer. This offer was made in 12th of August, 1958. It was stated, that the petitioners and the share-holders who belonged to their group, had not chosen to buy the shares, whereas, all the share-holders belonging to the group of the Managing Director have purchased the shares in terms of said resolution."

"The petitioners now do not deny that the offer was made, but they have expressed their unwillingness to purchase the shares offered. They have taken their stand on the legal ground that additional shares cannot be offered to strangers."

"If the attitude as has been adopted by the petitioners in this case, can be deemed to be permissive in law, then it will be virtually impossible for a company to increase its capital where the existing share-holders are unwilling to purchase shares, or debentures of the company, even if the total number of its members is much below 50."

It may be noted that the shares in question were first offered to the petitioners — and were only allotted after they refused them to the "selected persons". This could also have been done here in accordance with Article 46. Section 67 of the Indian Companies Act, 1956 in the Rattan Singh case dispensed with the requirement of a prospectus accompanying an offer to subscribe where shares were offered to the persons named in the section. It is similar to the English Section 55 and an extract from *Palmer's* Company Law (21st Edition) page 150 would clarify this:

"'TO THE PUBLIC.' Section 55 provides an aid for the construction of the phrase offering shares or debentures 'to the public', but that aid is flexible and enables the courts to deal with each case according to its surrounding circumstances. The section provides in subsection (1) that any reference to the public in the Act or in the articles of the company shall be construed as including —

'A reference to ... any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.'

This provision places it beyond doubt that a circular addressed by the company to its members or debenture holders in the case of rights or bonus issues is, on principle, a prospectus and that the same applies to placings by issuing houses or stock-brokers. Subsection (1) of section 55 thus extends the meaning of an offer 'to the public' beyond the popular meaning of that phrase.

While subsection (1) thus extends the area of operation of the prospectus provisions of the Act, subsection (2) excludes from it offers which are essentially the domestic concern of the persons making and receiving them.

Subsection (2) provides:

The foregoing subsection shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it, and in particular —

(a) a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded as aforesaid; and

(b) the provisions of this Act relating to private companies shall be construed accordingly.'

The last part of the subsection, beginning with the words 'and in particular,' safeguards the position of the private company: it places it beyond doubt that in such a company a pre-emptive offer of a new issue of shares or debentures to the existing holders is not caught by subsection (1) of section 55 and, consequently, does not infringe the prohibition of section 28(1)(c)."

(Section 28(1)(c) is identical to Article 1(c).) In our own Act, section 4(6) under the definition of "unlimited company" is now set out:

"Any reference in this Act to offering shares or debentures to the public shall, unless the contrary intention appears, be construed as including a reference to offering them to any section of the public, whether selected as clients of the person issuing the prospectus or in any other manner; but a *bona fide* offer or invitation with respect to shares or debentures shall not be deemed to be an offer to the public if it is —

(a) an offer or invitation to enter into an underwriting agreement;

(b) made to a person whose ordinary business it is to buy and sell shares or debentures whether as principal or agent;

(c) made to existing members of debenture holders of a corporation and relates to shares in or debentures of that corporation; or

(d) made to existing members of a company within the meaning of section 270 and relates to shares in the corporation within the meaning of that section."

There can be no doubt that the offer to the nine named Bumiputras is not within categories (a) to (d). The word "public" is not defined in the Act and except where otherwise expressly provided should be given its ordinary meaning. We would respectfully disagree and hold that the decision of April 7, 1973 is in contravention of Article 1(c).

It also follows therefrom that it is not enough for the Appellants merely to claim acceptance of the New Economic Policy. The decision must also be in accord with the Articles and it has not been shown to be. There is the admitted failure to offer or give notice to the respondent and other shareholders in contravention of Article 46. We therefore dismiss the appeal with costs here and in the court below.

We would before departing make one observation, particularly with reference to that ground which averred the judge in error in going outside the pleadings. We need not now say more than that it is clear from what we have said that the respondent has proved both issues namely, an issue to the public in contravention of Article 1(c) and a failure to offer or notify them of the proposed issue. These two issues were all that mattered and need not have entailed any of the evidence that had been adduced. The appellants were evasive and both they and the secretary failed to display the openness which was to be expected of them. What was the reason for pretending ignorance of the decision of April 7, 1973? Why put the plaintiff to proof of matters which could not be denied? Was it not the easiest thing for them to say —

1) By a majority decision of the directors, it was decided to allot 31,500 shares to these nine named Bumiputras.

2) We believe this in accord with our Resolution of November 29, 1972.

3) We believe this not to be contrary to the Articles.

4) If it is, then we would put the matter before the General Meeting for approval and consequential amendment of the Articles.

We do not accede to a request for a new trial. We repeat the appeal is dismissed with costs.

Ali and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *A. K. J. D'Cruz & Co.; Dulip Singh & Co.*

PUBLIC PROSECUTOR v. FAN YEW TENG

[O.Cr.J. (Abdul Hamid J.) January 13, 1975]
[Kuala Lumpur — Criminal Trial No. 4 of 1974]

Criminal Law and Procedure — Sedition — Freedom of Speech — Seditious tendency — Whether speech has tendency to excite disaffection — Sedition Act, 1948, ss. 3 and 4.

The accused was charged for publishing a seditious publication i.e. an article under the caption "Alliance Policy of Segregation 'Evidence Galore' listed by Dr. Ooi" in the December 1970 issue of the *Rocket* an official organ of the Democratic Action Party, giving the full text of a speech delivered by Dr. Ooi Kee Saik.

Held: (1) on the evidence produced by the prosecution the court was satisfied beyond reasonable doubt that the accused published the article which was the subject of the charge;

(2) the speech read as a whole, even accepting it in a somewhat larger and broader latitude of the type of criticism expected from the leader of the opposition party making a speech political in nature, and bearing in mind the limits governing the right to freedom of speech and expression, had gone beyond what is sanctioned by the law and had in fact a seditious tendency;

(3) the accused was therefore guilty of the offence charged and should be fined $2,000 in default 6 months imprisonment.

Editorial Note: Reference may be made to *Public Prosecutor* v. *Ooi Kee Saik & Ors.* [1971] 2 M.L.J. 108, on appeal to the Federal Court *Fan Yew Teng* v. *Public Prosecutor* [1971] 2 M.L.J. 271 and on further appeal to the Privy Council *Public Prosecutor* v. *Fan Yew Teng* [1973] 2 M.L.J. 1.